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FIRST GENERAL COUNSEL'S REPORT

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MUR: 6449

DATE COMPLAINT FILED: December 30, 2010

DATE OF NOTIFICATION: January 7, 2011

DATE OF AMENDMENT: June 13, 2011

DATE OF NOTIFICATION: June 14, 2011

DATE OF LAST RESPONSE: July 18, 2011

DATE ACTIVATED: May 11, 2012<sup>1</sup>

EXPIRATION OF SOL: December 31, 2012,  
to January 31, 2016

COMPLAINANT:

Laura Wigley  
Nebraska Democratic Party

RESPONDENTS:

Jon Bruning  
Friends of Jon Bruning and Douglas R. Ayer,  
in his official capacity as treasurer (terminated)  
Jon Bruning Exploratory Committee  
Bruning for Senate, Inc. f/k/a Bruning 2012  
Exploratory Committee and Douglas R. Ayer  
in his official capacity as treasurer

RELEVANT STATUTES  
AND REGULATIONS:

2 U.S.C. § 431(2)  
2 U.S.C. § 432(e)(1)  
2 U.S.C. § 433(a)  
2 U.S.C. § 434(a)  
2 U.S.C. § 441a(a)  
2 U.S.C. § 441a(f)  
11 C.F.R. § 100.72  
11 C.F.R. § 100.131  
11 C.F.R. § 101.1(a)  
11 C.F.R. § 101.3

INTERNAL REPORTS CHECKED:

Disclosure Reports

OTHER AGENCIES CHECKED:

None

<sup>1</sup> This matter was first activated on March 15, 2011, then deactivated after an Amendment to the Complaint was filed on June 13, 2011.

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**I. INTRODUCTION**

The Complaint alleges that Jon Bruning, a candidate for the United States Senate from Nebraska in 2012, violated the Federal Election Campaign Act of 1971, as amended, (the "Act") when he triggered candidate reporting requirements in November 2010 but failed to timely file a Statement of Candidacy with the Commission to designate his principal campaign committee.<sup>2</sup>

The Complaint further alleges that Bruning's committee failed to timely file a Statement of Organization and to timely disclose receipts and disbursements.

After Bruning registered as a candidate in January 2011 and his committee, Bruning for Senate, Inc., ("Bruning 2012")<sup>3</sup> filed its first disclosure report in April 2011, complainant filed an Amendment to the Complaint. The Amendment alleged additional violations related to funds received from the Jon Bruning Exploratory Committee ("JBEC"). JBEC is an unregistered entity that held funds raised by Bruning's unsuccessful 2008 campaign for Nebraska's other Senate seat. The Amendment alleges that, as a result of the transfer from JBEC, Bruning 2012 may have received excessive contributions from contributors to Bruning's 2008 campaign and that not all of the 2008 campaign funds are accounted for. It further alleges that JBEC was required to register and report as a political committee, but has failed to do so.<sup>4</sup>

Respondents deny both sets of allegations. They contend Bruning did not become a candidate in November 2010, but instead was "testing the waters" for the 2012 election at that

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<sup>2</sup> Bruning lost the May 15, 2012, primary election for United States Senate.

<sup>3</sup> The Bruning 2012 Exploratory Committee, the committee we originally notified, became Jon Bruning for Senate, Inc., on January 3, 2011, when it filed its Statement of Organization as Bruning's principal campaign committee. Consequently, we make recommendations as to Bruning for Senate, Inc. f/k/a Bruning 2012 Exploratory Committee and Douglas R. Ayer in his official capacity as treasurer.

<sup>4</sup> The Complaint also alleges that Respondents failed to disclose their activity to the IRS. *See* Compl. at 1-2, 9-10. This Report will address only the potential violations of the Act, as the Commission has no jurisdiction over IRS matters.

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1 time. They contend he became a candidate only upon timely filing his Statement of Candidacy  
2 on January 6, 2011, and that Bruning 2012 timely filed its Statement of Organization on the same  
3 day.<sup>5</sup> Finally, Respondents deny that JBEC had to register as a political committee and deny that  
4 Bruning 2012 knowingly accepted contributions in excess of the Act's limitations. Therefore,  
5 Respondents ask that the Commission dismiss the allegations.<sup>6</sup>

6 Based on the available information, we recommend that the Commission find reason to  
7 believe that Jon Bruning failed to timely file his Statement of Candidacy and designate his  
8 principal campaign committee and that Bruning 2012 failed to timely file a Statement of  
9 Organization and to disclose in full the receipts and disbursements associated with the  
10 campaign's testing the waters activity. We further recommend that the Commission dismiss the  
11 allegation as to JBEC, find no reason to believe that Bruning 2012 knowingly accepted excessive  
12 contributions, and find no reason to believe that Bruning 2008 violated the Act. We also  
13 recommend that the Commission authorize pre-probable cause conciliation.

## 14 II. FACTUAL AND LEGAL ANALYSIS

### 15 A. Factual Summary

16 Jon Bruning was a candidate for the United States Senate from Nebraska in both 2008  
17 and 2012. Bruning registered his 2008 principal campaign committee, Friends of Jon Bruning

<sup>5</sup> Respondents' filings were postmarked January 3, 2011, which serves as the filing date. See 2 U.S.C. § 434(a)(5). We will refer to the January 3 date in this Report.

<sup>6</sup> The "Response and Motion to Dismiss Complaint" was filed on behalf of Bruning's 2008 committee, Friends of Jon Bruning, but the other Respondents subsequently adopted it in its entirety. See Letter from Cleta Mitchell, Counsel, Bruning 2012 *et al.*, to Jeff S. Jordan, Supervisory Attorney, FEC (Mar. 11, 2011). The response to the Amendment to the Complaint, filed with the Commission on July 18, 2011, was also filed on behalf of all Respondents. The fact that the initial response is styled as a motion to dismiss does not require any additional procedural steps for the Commission. In the past, the Commission has treated a motion to dismiss like any other response and addressed its merits at the reason to believe stage. See Memorandum (Dec. 10, 2008), MUR 6023 (Loeffler Group) (explaining that the Act does not provide for motions to dismiss and that the Commission typically addresses such a motion when considering a First General Counsel's Report as a request that the Commission not proceed, either through dismissal or through a no reason to believe finding).

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1 ("Bruning 2008"), with the Commission. On November 19, 2007, Bruning withdrew from the  
2 2008 election. Jon Bruning Aff. ¶ 3 (Feb. 21, 2011). On December 31, 2007, Bruning 2008  
3 transferred its remaining funds, \$677,251.49, to JBEC, which Respondents describe as a  
4 "'testing the waters' account for a possible future federal election." *See* Bruning 2008 Year End  
5 Report for 2007 at 75; Bruning Aff. ¶¶ 8-9, 14. On January 27, 2008, Bruning 2008 filed its  
6 2007 Year End Report as a termination report with the Commission, stating that its residual  
7 funds totaling \$677,251.49 were "transferred to an exploratory committee for a future election."  
8 *See* Resp., Ex. 7, Letter from Douglas Ayer, Treasurer, Friends of Jon Bruning, to Travis Brown,  
9 Reports Analysis Division ("RAD"), FEC (Jan. 28, 2008). JBEC, the recipient of these funds,  
10 has never registered with the Commission and never filed any disclosure reports. It exists solely  
11 as the name by which Bruning designated the financial account that would hold the funds from  
12 his terminated 2008 campaign for exploratory activities related to any subsequent campaign.

13 On November 5, 2010, according to Respondents, Bruning initiated "testing the waters"  
14 activities for the 2012 United States Senate election and Respondents opened a separate "2012  
15 Exploratory Account" for testing the waters. Resp. at 5; Bruning Aff. ¶ 16; Mark Pedersen Aff.  
16 ¶ 26 (Feb. 21, 2011) ("Feb. 2011 Pedersen Aff.").<sup>7</sup> Also on that date, JBEC transferred  
17 \$448,349.52 to the 2012 Exploratory Account. JBEC transferred an additional \$162,313.51 to  
18 the 2012 Exploratory Account on December 17, 2010. *See* 2011 April Quarterly Report of  
19 Bruning 2012 at 251.

20 On January 3, 2011, Bruning filed a Statement of Candidacy with the Secretary of the  
21 Senate for the 2012 Senate election, designating Bruning 2012 as his principal campaign  
22 committee. Also on that date, Bruning 2012 filed a Statement of Organization with the Secretary

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<sup>7</sup> Pedersen served as assistant treasurer of Bruning 2008 and serves as assistant treasurer of Bruning 2012.

1 of the Senate. *See Resp.*, Exs. 11-12. On April 15, 2011, Bruning 2012 filed its first disclosure  
2 report, the 2011 April Quarterly Report, disclosing its activity for November 2010 through  
3 March 2011, including its receipt of the November and December 2010 transfers from JBEC.

4 The Complaint cites press coverage concerning Bruning that commenced on  
5 November 5, 2010, and alleges that Bruning was not "testing the waters" but rather was already  
6 acting as a candidate for the 2012 Senate election. Compl. at 7-9, Exs. B-H (Dec. 30, 2010). For  
7 example, Bruning was quoted in a published article that day, "I want to run. I'm ready to run."  
8 Compl., Ex. D. Also included in the Complaint is a November 30, 2010, e-mail solicitation from  
9 Bruning stating, "Please help me defeat Ben Nelson in 2012 by making a contribution today."  
10 Compl., Ex. I.

11 **B. Legal Analysis**

12 **1. Legal Standards Applicable in "Testing the Waters" Matters**

13 An individual is deemed to be a "candidate" for purposes of the Act if he or she receives  
14 contributions or makes expenditures in excess of \$5,000. 2 U.S.C. § 431(2). Once an individual  
15 meets the \$5,000 threshold, he or she has fifteen days to designate a principal campaign  
16 committee by filing a Statement of Candidacy. 2 U.S.C. § 432(e)(1); 11 C.F.R. § 101.1(a).  
17 The principal campaign committee must then file a Statement of Organization within 10 days of  
18 its designation, *see* 2 U.S.C. § 433(a), and must file disclosure reports with the Commission in  
19 accordance with 2 U.S.C. § 434(a) and (b).

20 The Commission has established limited exemptions from these thresholds, which permit  
21 an individual to test the feasibility of a campaign for federal office without becoming a candidate  
22 under the Act. Commonly referred to as the "testing the waters" exemptions, 11 C.F.R.  
23 §§ 100.72 and 100.131 respectively exclude from the definitions of "contribution" and

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1 "expenditure" those funds received, and payments made, to determine whether an individual  
2 should become a candidate.<sup>8</sup> See 2 U.S.C. § 431(8), (9). "Testing the waters" activities include,  
3 but are not limited to, payments for polling, telephone calls, and travel. 11 C.F.R.  
4 §§ 100.72(a), 100.131(a). An individual who is "testing the waters" need not register or file  
5 disclosure reports with the Commission unless and until the individual subsequently decides to  
6 run for federal office or conducts activities that indicate he or she has decided to become a  
7 candidate. See *id.*; see also Advisory Op. 1979-26 (Grassley). All funds raised and spent for  
8 "testing the waters" activities are, however, subject to the Act's limitations and prohibitions.  
9 11 C.F.R. §§ 100.72(a), 100.131(a).

10 Once an individual begins to campaign or decides to become a candidate, funds that were  
11 raised or spent to "test the waters" apply to the \$5,000 threshold for qualifying as a candidate.  
12 11 C.F.R. §§ 100.72(a), 100.131(a). Certain activities may indicate that the individual has  
13 decided to become a candidate and is no longer "testing the waters." In that case, once the  
14 individual has raised or spent more than \$5,000, he or she must register as a candidate.  
15 Commission regulations set out five non-exhaustive factors to be considered in determining  
16 whether an individual has decided to become a candidate. An individual indicates that he or she  
17 has gone beyond "testing the waters" and has decided to become a candidate, for example, by  
18 (1) using general public political advertising to publicize his or her intention to campaign for  
19 federal office; (2) raising funds in excess of what could reasonably be expected to be used for  
20 exploratory activities or undertaking activity designed to amass campaign funds that would be

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<sup>8</sup> The Commission has emphasized the narrow scope of these exemptions to the Act's disclosure requirements. See Explanation and Justification for Regulations on Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9992, 9993 (Mar. 13, 1985) ("The Commission has, therefore, amended the rules to ensure that the 'testing the waters' exemptions will not be extended beyond their original purpose. Specifically, these provisions are intended to be limited exemptions from the reporting requirements of the Act . . .").

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1 spent after he or she becomes a candidate; (3) making or authorizing written or oral statements  
2 that refer to him or her as a candidate for a particular office; (4) conducting activities in close  
3 proximity to the election or over a protracted period of time; or (5) taking action to qualify for  
4 the ballot under state law. 11 C.F.R. §§ 100.72(b), 100.131(b). These regulations seek to draw a  
5 distinction between activities directed to an evaluation of the feasibility of one's candidacy, as  
6 distinguished from conduct signifying that a private decision to become a candidate has been  
7 made. See Advisory Op. 1981-32 (Askew).

8                   2.       Jon Bruning and Bruning 2012 Did Not Timely Register and Report

9           The Complaint alleges that Bruning triggered candidate reporting requirements no later  
10 than November 5, 2010, based on "his statements and actions" but failed to timely file a  
11 Statement of Candidacy with the Commission to designate his principal campaign committee.  
12 Compl. at 7-8. The Complaint further alleges that Bruning's 2012 committee failed to timely file  
13 a Statement of Organization and to timely disclose receipts and disbursements. *Id.* at 9.

14           In determining whether an individual has moved from "testing the waters" to candidacy,  
15 the Commission has considered whether the individual has engaged in activities or made  
16 statements that would indicate that he or she has decided to run for federal office.<sup>9</sup> Once an  
17 individual engages in these activities, he or she is a "candidate" under the Act, and the "testing  
18 the waters" exemption is no longer available. In this matter, available information indicates that

<sup>9</sup> See, e.g., MUR 5693 (Aronsohn) (Commission found probable cause to believe that individual became a candidate when he sent a solicitation letter that included statements such as "But I have the energy, the experience, and the determination to win this race. And as evidenced by the attached news article, I am ready to begin fighting for our future . . . now"; "Every dollar we receive in the next few weeks can help us prepare for this fight against [incumbent] Scott Garrett"; and "We have come a long way in just a few short weeks. And with your support, we can go the distance."). But see MUR 5934 (Thompson) (Commission failed, by a vote of 2-4, to find reason to believe, and then voted to dismiss allegations, that Thompson became a candidate by making statements such as "I can't remember exactly the point that I said, 'I'm going to do this,' but when I did, the thing that occurred to me 'I'm going to tell people that I am thinking about it and see what kind of reaction I got to it,'" and was quoted as saying that he was "testing the waters" about a run, "but the waters feel pretty warm to me" and "You're either running or not running. I think the steps we've taken are pretty obvious").

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1 Bruning made public statements and conducted activities during November 2010 that indicated  
2 that he had decided to run as of that time and should have registered with the Commission as  
3 required by the Act.

4 The Complaint attaches news articles dating back to approximately 60 days before  
5 Bruning registered as a candidate. In an article published on November 5, 2010 — the first day  
6 of Bruning's purported "testing the waters" activities and the day JSEC transferred \$448,349.52  
7 to "Bruning 2012 Exploratory Committee" — Bruning was quoted, "I want to run. I'm ready to  
8 run" and "I can't imagine any conditions under which I would not run." Compl., Ex. D, Don  
9 Walton, *Bruning Says He's Actively Exploring a Senate Campaign*, LINCOLN J. STAR, Nov. 5,  
10 2010.<sup>10</sup> Bruning also reportedly declared that while he bowed out of the 2008 Senate race at the  
11 request of then-President George W. Bush, "that's not going to happen again. I'm not asking  
12 permission. I'm not asking for a blessing." *Id.* Bruning is further quoted that he welcomes "a  
13 spirited primary" contest for the Republican nomination. *Id.* In another article, Bruning  
14 reportedly stated that he still had more than \$600,000 in federal campaign funds from his  
15 previous run and that he had hired four campaign workers. Compl., Ex. C, Paul Hammel, *Senate*  
16 *Interest for Bruning, Stenberg*, OMAHA WORLD-HERALD, Nov. 6, 2010.<sup>11</sup> Bruning reportedly  
17 also stated that his announcement only three days after his reelection as Nebraska Attorney  
18 General was not meant to scare off other potential candidates. *Id.*<sup>12</sup>

<sup>10</sup> [http://journalstar.com/news/local/govt-and-politics/article\\_88d3c204-e8f9-11df-805c-001cc4c002e0.html](http://journalstar.com/news/local/govt-and-politics/article_88d3c204-e8f9-11df-805c-001cc4c002e0.html).

<sup>11</sup> <http://www.omaha.com/article/20101106/NEWS01/711069870/202>.

<sup>12</sup> Two other press articles from early November 2010 included in the Complaint report that Bruning had declared his candidacy. See Compl., Ex. F, *Treasurer-elect Don Stenberg Ponders Senate Race*, LINCOLN J. STAR, Nov. 8, 2010 ("Attorney General Jon Bruning announced last week he will seek the Republican nomination for the Senate seat."); Ex. G, Robynn Tysver, *GOP Poll Finds Nelson Vulnerable, Viable*, OMAHA WORLD-HERALD, Nov. 9, 2010 ("So far, only Bruning has declared his candidacy."). Neither of these articles contains quoted statements from Bruning.

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1 After Bruning's reported statements suggesting that he had made the decision to run for  
2 Senate — "I want to run. I'm ready to run," and "I'm not asking permission." — he made a  
3 more definitive statement on November 15, 2010, when he tweeted "Nebraska State Treasurer  
4 Shane Osborne to chair our campaign." Compl., Ex. J. Finally, in a November 30, 2010,  
5 solicitation e-mail, Bruning stated, "Please help me defeat Ben Nelson in 2012 by making a  
6 contribution today. Together we can take back this country and bring true Nebraska values to  
7 Washington." Compl., Ex. I.

8 That November 30, 2010, solicitation in particular demonstrates that Bruning had by that  
9 time concluded he would run. By soliciting funds to be used to campaign against a specifically  
10 named opponent, Bruning made or authorized a statement that refers to himself as a candidate for  
11 a particular office, and thus certainly by this point he was no longer merely evaluating the  
12 viability of his candidacy but had decided to campaign for office. *See* 11 C.F.R.  
13 §§ 100.72(b)(3), 100.131(b)(3). Bruning's message is comparable to the solicitation letter at  
14 issue in MUR 5693 (Aronsohn), where the Commission found probable cause to believe that the  
15 candidate was no longer "testing the waters" after sending a solicitation letter including a  
16 statement that "[e]very dollar we receive in the next few weeks can help us prepare for this fight  
17 against [incumbent] Scott Garrett." *Cf.* Advisory Op. 1981-32 (Askew) (the "testing the waters"  
18 exemption "becomes inapplicable once the public activities of the individual take on a partisan  
19 political quality which would indicate that a decision has been made to seek nomination for  
20 election, or election, to a Federal office;" conduct of this type "is distinguished from continuing  
21 to deliberate whether one should actually seek election Federal office.")). Although Bruning's  
22 solicitation was sent under the email letterhead of the 2012 Exploratory Committee, the text of  
23 the email indicates that Bruning had decided to run. *See* MUR 5693 (Aronsohn) (the use of the

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word "exploratory" in communications that otherwise evidence candidate status does not prevent the application of the Act's requirements that the candidate register and report with the Commission).

Bruning's November 30, 2010, solicitation e-mail also indicates his intention to amass campaign funds to spend after he becomes a candidate, another example identified in the testing the waters regulation. 11 C.F.R. §§ 100.72(b)(2), 100.131(b)(2); *see* Compl. at 7 (allegation that funds raised by the Bruning 2012 Exploratory Committee, including the \$610,663.03 transferred from the Bruning 2008 campaign, are in excess of what would be required to conduct "testing the waters" activities, and were instead intended to be used by Bruning's 2012 campaign). Because of the 2008 cycle funds, the 2012 Exploratory Committee commenced its purported "testing the waters" activities in November 2010 with \$448,349.52 in its accounts, while JBEC, Bruning's initial "testing the waters" account, retained at least another \$162,000. In addition to the funds transferred from Bruning 2008, in its 2011 April Quarterly Report Bruning 2012 disclosed \$239,038 in receipts received before Bruning filed a Statement of Candidacy on January 3, 2011. On the other hand, Bruning 2012 Exploratory Committee disbursed only \$47,359 for "operating expenditures" prior to January 2011. *See* Bruning 2012 2011 April Quarterly Repnrt. Thus, at the time Bruning filed a Statement of Candidacy, he had amassed approximately \$800,000 in his 2012 exploratory account.<sup>13</sup>

Although the Commission's regulations require that funds raised during the "testing the waters" period not exceed that amount which is necessary to conduct activities related to the

<sup>13</sup> Although the Complaint alleges that the \$677,251.49 transfer to JBEC from Bruning 2008 on December 31, 2007, "was a tactic to 'amass' funds to be used *after* he became a candidate in a future election," Compl. at 7, it is more difficult to assess these funds due to the lack of information as to Bruning's future plans at that time and, accordingly, what funds may have been reasonably necessary for "testing the waters" would likely depend on which elective office Bruning sought.

1 determination of whether a run is feasible, *see* 11 C.F.R. §§ 100.72(b)(2), 100.131(b)(2), the  
2 Commission has previously determined that exceeding the contribution threshold, or even raising  
3 a more significant amount of contributions, was not sufficient by itself to remove a candidate and  
4 his or her activities from the "testing the waters" exemption.<sup>14</sup> Here, however, JBEC's  
5 \$610,663.03 that it transferred to the 2012 Exploratory Committee — funds that were largely  
6 unspent during Bruning's purported "testing the waters" period and ultimately available for  
7 activities related to Bruning's candidacy — plus the additional \$245,438 raised during that  
8 period, stand alongside Bruning's public statements, including that he was soliciting funds to  
9 defeat an incumbent Senator. Taken together, the circumstances amply demonstrate that Bruning  
10 moved from "testing the waters" into candidate status no later than November 30, 2010.<sup>15</sup>

11 Respondents assert that Bruning was "testing the waters" for the 2012 election as of  
12 November 5, 2010, and only later, "[o]ver the 2010 holidays, [he] made the final decision to seek  
13 the United States Senate seat from Nebraska . . . ." Resp. at 5 (Feb. 22, 2011); Bruning Aff.  
14 ¶¶ 16-17. Thus, Respondents contend that when Bruning filed his Statement of Candidacy on  
15 January 3, 2011, and his principal campaign committee filed its Statement of Organization on the  
16 same day, both were timely. Resp. at 5-6. Respondents do not, however, describe their "testing

<sup>14</sup> See, e.g., MUR 6224 (Fiorina) (no reason to believe where a United States Senate candidate's campaign committee raised in excess of \$600,000 and spent over \$300,000 during the "testing the waters" phase of a campaign).

<sup>15</sup> The Commission's Statement of Reasons in MUR 2710 (Sloane) concluded that funds raised for "testing the waters" activity should not necessarily or presumptively be considered the amassing of campaign funds, nor should candidacy be imputed, solely because funds raised for the exploratory effort may not be entirely spent during the reporting period in which they were raised, or because a particular fundraising activity may be more successful in generating funds than expected or immediately needed, or because an exploratory committee eventually transfers its unspent funds to a successor authorized committee upon declaring candidacy. Statement of Reasons, Comm'r's Aikens, Elliott, Josefak, McDonald, McGarry & Thomas, MUR 2710 (Sloane). In the present matter, the \$448,349.52 transferred from JBEC in November 2010 was not raised for "testing the waters" and the 2012 Exploratory Committee spent only \$19,129.99 during November 2010, the period during which Bruning was arguably "testing the waters." Even if the transferred funds had been raised for exploratory activity, spending such a small fraction of the funds (4.3%) for that purpose suggests an effort to amass campaign funds, not merely failing to spend them around the time they were raised.

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1 the waters" activities. Nor do they address the allegations in the Complaint regarding public  
2 statements that indicate Bruning had decided he would be a candidate or the fact that the funds  
3 amassed by the Committee were in excess of what would be required to test the waters.

4 Relying on Bruning's November 30, 2010, solicitation to collect funds to defeat the  
5 incumbent, Senator Ben Nelson, as the last possible date that Bruning became a candidate for the  
6 2012 election, he was required to designate a principal campaign committee by filing a  
7 Statement of Candidacy with the Commission within fifteen days, or by December 15, 2010, at  
8 the latest. *See* 2 U.S.C. § 432(e)(1); 11 C.F.R. § 101.1(a). Bruning's principal campaign  
9 committee was then required to file a Statement of Organization within ten days of its  
10 designation, or by December 25, 2010, at the latest, *see* 2 U.S.C. § 433(a), and to file its 2010  
11 Year-End disclosure report with the Commission, in accordance with 2 U.S.C. § 434(a), by  
12 January 31, 2011. Bruning did not file his Statement of Candidacy with the Commission until  
13 January 3, 2011, and Bruning 2012 did not file its first disclosure report, the 2011 April  
14 Quarterly, until April 15, 2011.<sup>16</sup> Accordingly, we recommend that the Commission find reason  
15 to believe that Jon Bruning violated 2 U.S.C. § 432(e)(1) and 11 C.F.R. § 101.1(a) and that  
16 Bruning for Senate, Inc. f/k/a Bruning 2012 Exploratory Committee and Douglas R. Ayer in his  
17 official capacity as treasurer violated 2 U.S.C. §§ 433(a) and 434(a).<sup>17</sup>

<sup>16</sup> We note that this matter is distinguishable from other matters, which were dismissed by the Commission where a candidate failed to timely file a statement of candidacy for longer periods of time. *See, e.g.*, MUR 6282 (Friends of John Lee Smith) (EPS dismissal where statement of candidacy filed more than 30 days late); MUR 6374 (Roly Arrojo for Congress) (EPS dismissal where statement of candidacy filed 60 days late). However, these prior matters either did not result in the candidate missing the filing of a scheduled report (Smith), or else involved a missing report that contained little financial activity (Arrojo). Bruning's failure to timely file his statement of candidacy resulted in the failure of Bruning 2012 to file its 2010 Year-End report at all and to omit over \$850,000 in activity. Accordingly, we conclude that the violations in this matter are material and thus not suited to dismissal as a matter of prosecutorial discretion.

<sup>17</sup> Respondents assert that because the Commission did not object to Bruning 2008's transfer of its excess campaign funds to JBEC at the time of the December 31, 2007, transfer, the Commission is now estopped from penalizing Respondents for "inadvertent or technical errors." Resp. at 8-9. The response does not specify what

3. Bruning 2012 Should Have Disclosed All of Bruning's Testing the Waters Activity, Including JBEC's Activity

The Amendment to the Complaint alleges that JBEC was required to disclose its contributions and expenditures when it triggered political committee status by transferring \$448,349.52 to Bruning's 2012 Senate campaign on November 5, 2010. Amend. Compl. at 3, 5-6. Respondents state that JBEC was "established in December, 2007 as a testing the waters account, authorized by Mr. Bruning for the purpose of exploring a possible future federal candidacy," and that "testing the waters" accounts are not obligated to register and report until the candidate determines that he or she is a federal candidate. Resp. at 6; Amend. Resp. at 1-2 (July 18, 2011).

Respondents are correct, up to a point. After an individual reaches candidate status, however, all reportable amounts from the beginning of the "testing the waters" period must be filed with the first financial disclosure report filed by the candidate's committee, even if the funds were received or expended prior to the current reporting period. See 11 C.F.R. §§ 100.72(a), 100.131(a), 101.3, 104.3(a)-(b).

Accordingly, regardless of when Bruning became a candidate for the 2012 election, his principal campaign committee, Bruning 2012, should have disclosed all of the testing the waters activity — which here would include the activity of Bruning's other exploratory account, JBEC — on its first disclosure report, the 2011 April Quarterly, rather than solely the transfers that

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potential "errors" the Commission is assertedly estopped from penalizing. Respondents themselves acknowledge that "the general rule is that equitable estoppel is not applicable against the government regardless of the actions of its agents." *Id.* at 8. Respondents argue that this matter merits an exception to the rule, citing *Tokony v. United States*, 417 F. Supp. 78 (S.D.N.Y. 1976). In that case, the IRS sent a letter to a taxpayer requesting a payment "as soon as possible" and suggesting the possibility of alternative arrangements, but subsequently informed the taxpayer, who had been in the hospital, that he was in default. By contrast, the Commission never offered Respondents any assurance regarding their actions. Rather, as noted below, RAD advised Bruning to seek an Advisory Opinion on the subject of re-designations of Bruning 2008 general election contributions to JBEC. Nonetheless, to the extent Respondents assert that the Commission is estopped from penalizing Respondents for Bruning 2008's transfer to JBEC, we do not analyze whether the \$677,251 transfer was itself a violation of the Act.

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1 JBEC made to the 2012 Exploratory Account on November 5, 2010, and December 17, 2010.  
2 Authorized committees are required to disclose, *inter alia*, dividends and interest received and  
3 contribution refunds disbursed, as well as all transactions in which they engaged. See 2 U.S.C.  
4 § 434(b)(2)(J), (b)(4)(F). Respondents here characterize JBEC as an exploratory, testing the  
5 waters account, Resp. at 3; Bruning Aff. ¶¶ 8-9; like the 2012 Exploratory Account, it is a named  
6 financial account indistinguishable from Bruning 2012, the recipient of the funds, after Bruning  
7 became a candidate. See 11 C.F.R. §§ 100.72(a), 100.131(a). Accordingly, all transactions from  
8 both exploratory accounts should have been disclosed, not merely the transfer of funds from the  
9 first account to the Bruning 2012 account opened later. As such, Bruning 2012 should have  
10 disclosed these transactions for JBEC dating back to December 31, 2007 as well as Bruning 2012  
11 when it disclosed testing the waters activity after Bruning became a candidate. See 2 U.S.C.  
12 § 434(b); 11 C.F.R. §§ 100.72(a), 100.131(a), 101.3, 104.3(a)-(b).

13 In view of Bruning 2012's responsibility to disclose JBEC's activity, we recommend that  
14 the Commission find reason to believe that Bruning for Senate, Inc. f/k/a Bruning 2012  
15 Exploratory Committee and Douglas R. Ayer in his official capacity as treasurer violated  
16 2 U.S.C. § 434(b) by failing to disclose JBEC's activity on its 2011 April Quarterly Report. In  
17 light of this recommendation and the requirement in the proposed conciliation agreement below  
18 that Bruning 2012 amend its disclosure reports to disclose JBEC's activity, we recommend that  
19 the Commission dismiss the allegation that the Jon Bruning Exploratory Committee failed to  
20 register and report as a political committee in violation of 2 U.S.C. §§ 433(a) and 434(a).

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4. The Permissibility of Bruning 2008 Contributions Transferred  
to Bruning 2012

The Amendment to the Complaint alleges that JBEC likely accepted excessive contributions from contributors whose contributions to Bruning 2008 were transferred to Bruning 2012 through JBEC. Amend. Compl. at 3-4, 6-7. Respondents deny the allegation. The available information indicates that Bruning 2012 did not accept excessive contributions in this manner.

a. 2008 Primary Election Contributions

The Act limits the amount of contributions by individuals to authorized committees of a candidate to \$2,300 per election in the 2008 cycle and \$2,500 per election in the 2012 cycle, and no political committee may knowingly accept contributions in excess of these limits. 2 U.S.C. §§ 441a(a)(1)(A), 441a(f). The Amendment to the Complaint alleges that Bruning 2012, on its 2011 April Quarterly Report, failed to identify the Bruning 2008 contributors whose funds comprised the \$448,349.52 transfer from JBEC on November 5, 2010, and that Bruning 2012 thereby may have received excessive contributions from these contributors if they subsequently donated to Bruning 2012 for the primary and general elections. Amend. Compl. at 3. Respondents state that these funds are comprised of contributions for Bruning's 2008 primary election plus interest earned on the funds while in the JBEC account.<sup>18</sup> July 2011 Pedersen Aff. ¶ 22.

Bruning's 2008 primary contributions constitute excess campaign funds, the disposal of which is broadly permissible so long as the disposal does not constitute personal use. See 2 U.S.C. § 439a. The Commission has permitted the disposal of a candidate's excess

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<sup>18</sup> Bruning 2012's disclosure report describes the receipt from JBEC as "Transfer of Surplus Funds-No Donor Item[ization]." Bruning 2012 April 2011 Quarterly Report at 251.

1 contributions for the purpose of supporting the candidate's future campaigns. *See* Advisory Op.  
2 1980-113 (Miller) (candidate may dispose of his excess campaign funds by establishing a  
3 campaign fund for candidate's future campaigns for office including federal office). The  
4 Commission's regulations generally permit transfers without limit between a candidate's  
5 previous federal campaign committee and his or her current federal campaign committee.  
6 11 C.F.R. § 110.3(c)(4).

7 The 2008 primary election contributions, because they were made prior to Bruning's  
8 withdrawal from the 2008 election, do not count against the contribution limits for any  
9 subsequent election such as the 2012 election. *See* 11 C.F.R. § 110.3(c)(4)(iii); Advisory Op.  
10 1977-24 (Duncan). Similarly, the 2008 primary contributions comprising the \$448,349.52  
11 transfer did not have to be itemized by Bruning 2012 because they were contributions to  
12 Bruning's 2008 primary election. *See* FEC Candidate Campaign Guide at 108-09. Moreover,  
13 Respondents state that they monitor the 2008 donors' contributions to Bruning 2012 "to ensure  
14 that any donor who made contributions during the 2008 cycle do [*sic*] not make contributions in  
15 the aggregate which exceed \$2500 for the 2012 primary and \$2500 for the 2012 general  
16 election." Amend. Resp. at 2; *see also* July 2011 Pedersen Aff. ¶¶ 30-31.

17 b. 2008 General Election Contributions

18 The Amendment to the Complaint states that Bruning 2012, on its 2011 April Quarterly  
19 Report, properly itemized the \$162,100 transfer from JBEC on December 17, 2010. Amend.  
20 Compl. at 3 n.4. Respondents state that these funds are comprised of contributions for Bruning's  
21 2008 general election which were redesignated by the donors to JBEC, plus accrued interest

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1 from November and December 2010.<sup>19</sup> July 2011 Pedersen Aff. ¶ 23. The available information  
2 does not suggest that Bruning 2012 has received excessive contributions as a result of its receipt  
3 of the Bruning 2008 general election contributions, but as noted below, the redesignations to  
4 JBEC present a novel issue.

5 Bruning ended his 2008 campaign in November 2007 and thus did not participate in the  
6 2008 general election. Under the Commission's regulations, if a candidate does not participate  
7 in the general election, any contributions made for the general election shall be refunded to the  
8 contributors, redesignated, or reattributed in accordance with the Commission's regulations.  
9 11 C.F.R. § 102.9(e)(3); *see* Advisory Op. 2003-18 (Smith). Treasurers of authorized  
10 committees may request a written redesignation of a contribution by the contributor for a  
11 different election if certain conditions are met. 11 C.F.R. § 110.1(b)(5). According to RAD's  
12 communication log, Bruning asked if he could keep the money he received for the 2008 general  
13 election despite dropping out of the race. The RAD Analyst told Bruning that typically such  
14 money needed to be refunded, but that Bruning's idea of redesignating the funds to a future  
15 election by holding it in an exploratory committee would have to be explored via an Advisory  
16 Opinion. RAD Communication Log, Dec. 11, 2007.<sup>20</sup> Bruning did not request an Advisory  
17 Opinion. Rather, according to Respondents, he asked the 2008 general election contributors in  
18 writing to redesignate their contributions to JBEC "for a future election" and advised  
19 contributors that they could in the alternative receive a refund. Resp. at 3, Ex. 14 (sample  
20 redesignation request); Bruning Aff. ¶ 10; Feb. 2011 Pedersen Aff. ¶ 12. On December 31,

<sup>19</sup> Bruning 2012 itemized contributions from 71 individuals on its 2011 April Quarterly Report at 252-75. Also on December 17, 2010, Bruning 2012 received an unitemized \$213.51 transfer from JBEC, which may be the accrued interest.

<sup>20</sup> Bruning avers that he "spoke repeatedly to the FEC analyst assigned to [his] campaign in 2007 and also sought expert legal advice in 2007 and 2008 to make certain [he] was doing everything according to the FEC regulations." Bruning Aff. ¶ 21.

1 2008 campaign committee which terminated in 2008, does not appear to have violated any  
2 provision of the Act, we recommended that the Commission find no reason to believe that  
3 Friends of Jon Bruning violated the Act.

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2007, Bruning 2008's transfer of \$677,251.49 to JBEC consisted partly of 2008 general election contributions "from donors who had not yet requested refunds . . . and others who had redesignated their contributions to the Bruning Exploratory Account." Feb. 2011 Pedersen Aff. ¶ 17.

The Commission has recognized redesignations to specific future elections. *See* Advisory Op. 1992-15 (Russo) (candidate who lost a primary election may obtain from general election contributors redesignations to the primary election of the next election cycle); Advisory Op. 2009-15 (White) (contributions designated for an election that does not occur or in which a person is not a candidate must be refunded, "redesignated for another election in which the candidate has participated or is participating in accordance with 11 CFR 110.1(b)(5)," or reattributed). The Commission has not recognized general redesignations "for a future election," although by making such a redesignation, contributors in this matter assented to the use of their contributions in connection with another Bruning election. Respondents state they monitored the 2008 contributions transferred to Bruning 2012 to make sure when aggregated with 2012 contributions they were not excessive. The available information does not indicate that Respondents have accepted excessive contributions and tends to confirm they have monitored the issue as they claim. For example, in March 2011, Bruning 2012 refunded \$2,300 to each of two contributors, Peggy Sokol and David Sokol, the amount of their contributions to Bruning 2008 for the general election, which were itemized in JBEC's transfer to Bruning 2012, after they each made the maximum \$2,500 contributions to Bruning 2012 on March 2, 2011.

Accordingly, we recommend that the Commission find no reason to believe that Bruning for Senate, Inc. f/k/a Bruning 2012 Exploratory Committee and Douglas R. Ayer in his official capacity as treasurer violated 2 U.S.C. § 441a(f). Finally, because Friends of Jon Bruning, his

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2 **IV. RECOMMENDATIONS**

- 3 1. Find reason to believe that Jon Bruning violated 2 U.S.C. § 432(e)(1) and 11 C.F.R.  
4 § 101.1(a);  
5  
6 2. Find reason to believe that Bruning for Senate, Inc. f/k/a Bruning 2012 Exploratory  
7 Committee and Douglas R. Ayer in his official capacity as treasurer violated  
8 2 U.S.C. §§ 433(a), 434(a) and 434(b);  
9  
10 3. Dismiss the allegation that Jon Bruning Exploratory Committee violated 2 U.S.C.  
11 §§ 433(a) and 434(a);  
12  
13 4. Find no reason to believe that Bruning for Senate, Inc. f/k/a Bruning 2012  
14 Exploratory Committee and Douglas R. Ayer in his official capacity as treasurer  
15 violated 2 U.S.C. § 441a(f);  
16  
17 5. Find no reason to believe that Friends of Jon Bruning and Douglas R. Ayer in his  
18 official capacity as treasurer (terminated) violated the Act;  
19  
20 6. Enter into conciliation with Jon Bruning and Bruning for Senate, Inc. f/k/a Bruning  
21 2012 Exploratory Committee and Douglas R. Ayer in his official capacity as  
22 treasurer prior to a finding of probable cause to believe;  
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24 7.  
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26 8. Approve the attached Factual and Legal Analysis; and  
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9. Approve the appropriate letters.

Date: August 9, 2012

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